GONDOLA MOTOR CREDIT SDN. BHD.

v.

ALMURISI HOLDINGS SDN. BHD.

SUPREME COURT, KUALA LUMPUR
MOHD. JEMURI SERJAN CJ (BORNEO)
HARUN HASHIM SCJ
WAN YAHYA J
[SC CIVIL APPEAL NO. 02-255-90]
3 SEPTEMBER 1992

LAND LAW: *Caveat - Land charged by registered owners to finance company as security for repayment of monies due - Charge registered on 15 November 1981 - Registered owners entered into sale/purchase agreement with respondent on 29 June 1985 - Respondent entered private caveat on land on 25 March 1986 - Effectiveness of respondent's caveat to prevent registration of certificate of sale acquired by appellant.*

The registered owners of the land in question in this case charged the property to Singapore Finance Bhd. The charge was registered on 15 November 1981 as security for the repayment of monies due to Singapore Finance from Raymond Yong Kim Yoong. On 29 June 1985, the registered owners entered into a sale and purchase agreement with the respondents who on 25 March 1986 entered a private caveat on the land.

On 8 September 1986, the respondents filed a writ against the registered owners claiming specific performance and or alternatively damages for breach of contract arising out of the sale and purchase agreement of 29 June 1985. Subsequently, the respondent obtained judgment in default of defence to the writ on 4 February 1987. On 25 May 1987 the chargee/finance company obtained an order for sale in respect of the said property for non-payment of the principal sum and interest.

The property was eventually sold at a public auction on 2 July 1989 to the appellants who were the successful bidders. On 7 November 1989 the Senior Assistant Registrar issued the certificate of sale under s. 259 of the National Land Code in favour of the appellants. The certificate of sale could not be registered because of the private caveat entered by the respondents. On being unable to register the certificate of sale issued by the Court, the appellants on 9 September 1989 applied to the Court for the removal of the private caveat and registration of the certificate of sale. The learned Judge of the High Court dismissed the appellants' application. Hence this appeal.

Held:

[1] Section 340(1) of the National Land Code 1965 confers an indefeasible interest in the land on the chargee upon registration of the charge unless it was made defeasible by s. 340(2) in cases of fraud, forgery or illegality which did not arise in the instant case.

[2] The Singapore Finance Ltd., as chargee, held an indefeasible interest in the subject land when the charge in its favour was registered on 15 November 1981.

[3] Under s. 256(3) of the National Land Code 1965, on an application to the Court for an order for sale by the chargee, it is mandatory on the Court to order the sale unless it was satisfied of the existence of cause to the contrary. In this case, no such cause to the contrary arose when the order for sale was made.

[4] In the circumstances of this case, the only relief available to the respondents was damages in lieu of specific performance which was what they prayed for and obtained in this suit through the default judgment against the registered owners of the subject land. Consequently, there is in fact and law no longer any justification for the caveat to remain on the register.

[5] In any event, the fact of registration of the charge was notice to all the world of its existence. Any dealings subsequent to the charge and notice of the charge as in this case cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale.

[6] For the reason stated, the appeal was allowed with costs. The order of the learned Judge was set aside and the caveat was ordered to be removed.

[Appeal allowed with costs. Order of the learned Judge set aside. Caveat ordered to be removed. Deposit refunded to appellants.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG TANAH: *Kaveat - Tanah digadaikan oleh pemilik-pemilik berdaftar kepada syarikat kewangan sebagai jaminan bagi pembayaran balik hutang - Gadaian didaftarkan pada 15 Novemer 1981 - Pemilik-pemilik berdaftar mengikat perjanjian jual/ beli dengan responden pada 29 Jun 1985 - Responden memasukkan kaveat persendirian ke atas tanah pada 25 Mac 1986 - Keberkesanan kaveat responden menghalang pendaftaran perakuan jualan yang diperolehi oleh perayu.*

Pemilik-pemilik berdaftar tanah yang dipersoalkan dalam kes ini telah menggadaikan harta tersebut kepada Singapore Finance Bhd. Gadaian tersebut telah didaftarkan pada 15 November 1981 sebagai jaminan untuk pembayaran balik wang yang terhutang kepada Singapore Finance oleh Raymond Yong Kim Yoong. Pada 29 June 1985, pemilik-pemilik berdaftar telah mengikat perjanjian jual dan beli dengan responden yang mana telah memasuki suatu kaveat persendirian ke atas tanah tersebut.

Pada 8 September 1986, responden telah memfailkan suatu writ terhadap pemilik-pemilik berdaftar menuntut pelaksanaan spesifik dan atau sebagai alternatif gantirugi bagi kemungkiran kontrak yang timbul daripada peranjian jual dan beli bertarikh 29 Jun 1985. Kemudiannya responden mendapatkan penghakiman ingkar pembelaan kepada writ pada 4 Februari 1987. Pada 25 Mei 1987, Pemegang gadaian/syarikat kewangan telah mendapatkan perintah jualan berhubung dengan harta tersebut kerana ketidakbayaran jumlah wang pokok dan faedah. Harta tersebut akbirnya dijual dilelongan awam pada 2 Julai 1989 kepada perayu yang berjaya menjadi penawar-belinya. Pada 7 November 1989 Penolong Kanan Pendaftar mengeluarkan sijil perakuan kepada perayu di bawah s. 259 Kanun Tanah Negara. Perakuan jualan tersebut tidak dapat didaftarkan akibat kaveat persendirian yang dimasukkan oleh responden. Oleh kerana tidak dapat mendaftarkan sijil perakuan jualan yang dikeluarkan oleh Mahkamah, perayu telah pada 9 September 1989 memohon kepada Mahkamah untuk pemotongan kaveat persendirian tersebut dan pendaftaran sijil perakuan jualan. Hakim Mahkamah Tinggi yang bijaksana tersebut telah menolak permohonan perayu. Oleh yang demikian, rayuan ini dibuat.

Diputuskan:

[1] Seksyen 340(1) Kanun Tanah Negara 1965 memberikan kepentingan dalam tanah yang tak boleh sangkal kepada pemegang gadaian yang telah daftar gadaian tersebut melainkan ianya dibatalkan oleh s. 340(2) dalam keadaan-keadaan seperti pemalsuan, fraud atau kepenyalahan undang-undang yang mana tidak timbul dalam kes ini.

[2] Singapore Finance Ltd. selaku pemegang gadaian tersebut, mempunyai kepentingan dalam tanah yang tak boleh sangkal apabila gadaian tersebut didaftarkan pada 15 November 1981.

[3] Di bawah s. 256(3) Kanun Tanah Negara 1965, atas permohonan kepada Mahkamah untuk perintah jualan oleh pemegang gadaian adalah mandatori bagi Mahkamah untuk memerintahkan jualan tersebut melainkan ia berpuashati bahawa wujudnya sebab-sebab sebaliknya. Dalam kes ini, tiada sebab-sebab sebaliknya timbul apabila perintah untuk jualan tersebut dibuat.

[4] Dalam keadaan sedemikian, satu-satunya relief yang ada pada responden ialah gantirugi sebagai ganti pelaksanaan spesifik yang mana merupakan relief yang mereka pohon dan telah pun diperolehi dalam guaman ini melalui penghakiman ingkar terhadap pemilik-pemilik berdaftar tanah tersebut. Akibatnya, dari segi fakta dan undang-undang tiada ada lagi sebarang justifikasi untuk kaveat tersebut kekal dalam daftar.

[5] Walau apa pun jua, fakta bahawa gadaian tersebut didaftarkan merupakan notis kepada semua akan kewujudannya. Sebarang urusan berikutan gadaian dan notis gadaian tersebut sebagaimana dalam kes ini tidak dapat menyangkal kepentingan pemegang gadaian dan melaluinya pembeli di dalam suatu jualan kehakiman.

[6] Atas sebab-sebab yang dinyatakan, rayuan dibenarkan dengan kos. Perintah Hakim yang bijaksana tersebut telah diketepikan dan perintah dikeluarkan untuk mengetepikan kaveat.

[Rayuan dibenarkan dengan kos. Perintah Hakim yang bijaksana diketepikan. Kaveat diperintah supaya diketepikan. Deposit dipulangkan kepada perayu.]

Cases referred to:
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 52 ***(refd)***
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212 ***(foll)***

Legislation referred to:
National Land Code 1965, ss. 256(3), 259,(3), 267, 327(1), 328, 340(1), (2)

For the appellant - Haridas Menon (Zainab Jan with him); M/s. T.K. Lim & Co.
For the respondent - Mohd. Shariff b. Mohd Ali; M/s. Shariff & Som

JUDGMENT

Harun Hashim SCJ:

Tanjung Petri Enterprise Sdn. Bhd. (Tg. Petri) became the registered owner of Lot No. PTB 8647 Town of Johor Bahru on 29 October 1978. In December 1978, the land was charged to the Overseas Chinese Banking Corporation Ltd. which charge was discharged on 29 October 1979. On the same day the land was charged to Asiavest Merchant Bankers, which charge was discharged on 12 April 1981. Finally on 2 November 1981, the land was again charged by Tg. Petri to Singapore Finance Ltd. which charge was registered on 15 November 1981 as security for the repayment of moneys due to Singapore Finance from Raymond Yong Kim Yoong of Singapore amounting to S$1,100,000 with interest. The charge to Singapore Finance includes three other lands *viz.* Lot Nos. PTB 8659, 8661 and 8666, all in the Town of Johor Bahru and registered in the name of Tg. Petri.

Tg. Petri was incorporated as a company in 1976 with the following subscribers:

1. Shaikh Mohamad bin S. Tahir of Kota Tinggi, Johor.
2. Raymond Yong Kim Yoong of Beach Road, Singapore.
3. Koh Kim Kuay of Kota Tinggi, Johor.

Shaikh Mohamad was a director of Tg. Petri from the date of its incorporation until he resigned on 30 April 1985.

On 10 April 1980, Tg. Petri granted an option to purchase Lot No. PTB 8647 on which stood a 4-storey shop-house to Shaikh Mohamad at the purchase price of RM199,750. The option was in writing and signed by its director, Raymond Yong. It stated that Shaikh Mohamad had paid a sum of RM39,950 and that this sum will not be refunded should he fail to exercise the option within the option period. The option, however, was only exercisable after 1 April 1985 but before 30 May 1985 at 4.00 p.m. by the payment of a further sum of RM39,950 towards the purchase price. The balance of the purchase price was payable within three months of exercising the option. When Shaikh Mohamad resigned as director of Tg. Petri on 30 April 1985 he had yet to exercise the option and the option remained unexercised on 30 May 1985.

On 29 June 1985, Tg. Petri entered into a sale and purchase agreement with Almurisi Holdings Sdn. Bhd. (Almurisi) of which Shaikh Mohamad was a director for the sale and purchase of Lot PTB 8647 at the purchase price of RM199,750. Clause 1 of the agreement declared that a deposit of RM79,900 had been paid and received by Tg. Petri who was to execute a valid and registrable transfer of the said property in escrow which is to be kept by the purchaser's solicitor pending completion of the sale. The purchase was to be completed on or before 31 August 1985 by the purchaser paying the balance of the purchase price of RM119,850. Failure to pay the balance would entitle Tg. Petri to forfeit the sum of RM19,975 and a sum of RM59,925 shall be refunded by Tg. Petri to the purchaser. Time shall be the essence of the agreement. Shaikh Mohamad signed the agreement on behalf of Almurisi.

On 5 July 1985 Tg. Petri issued a receipt for the sum of RM41,075 in favour of Shaikh Mohamad as part payment of the purchase price and the payment was stated to be by way of contra. Taking this sum into account, a sum of RM78,775 remained outstanding on 31 August 1985. Four months later, on 5 January 1986, the solicitor of Almurisi addressed a letter to the solicitor of Tg. Petri referring to negotiations between their clients in November 1985 to the effect that Tg. Petri had agreed to release the title deed to Almurisi within one month. That month had passed. It further said that the transfer document had been adjudicated for stamp duty and was ready for registration. Almurisi was ready and able to pay the balance of the purchase price amounting to RM78,775. It concluded by giving Tg. Petri one month from 5 January 1986 to deliver the title deed failing which they were at liberty to commence legal proceedings against Tg. Petri for specific performance and or alternatively for damages for breach of contract. On 25 March 1986, Almurisi entered a private caveat on the land. On 1 April 1986 a further sum of RM50,000 was paid by way of contra according to the receipt issued by Tg. Petri.

On 8 September 1986, Shaikh Mohamad and Almurisi took out a writ against Tg. Petri in Johor Bahru Civil Suit No. 22-1158 of 1986 claiming specific performance and or alternatively damages from breach of contract arising out of 10 April 1980 option and the sales and purchase agreement of 29 June 1985. It said that a balance of RM28,775 of the purchase price was still due.

Pursuant to a summons in chambers dated 31 December 1986, Almurisi obtained a judgment in default of defence to the writ from the Senior Assistant Registrar on 4 February 1987 and a further order that Tg. Petri deliver the document of title to Almurisi. Shaikh Mohamad has been in possession of the property since 10 April 1980.

In Johor Bahru Originating Summons No. 31-71-87, Singapore Finance as chargee applied for an order for sale in respect of Lot PTB 8647 for non-payment of the principal sum and interest despite repeated demands under s. 256 of the National Land Code. The Court made an order

for sale on 25 May 1987. The property was eventually sold at a public auction on 2 July 1989 for the sum of RM260,000. The successful bid was that of Gondola Motor Credit Sdn. Bhd. On 7 November 1989, the Senior Assistant Registrar issued the certificate of sale by the Court under s. 259 of the National Land Code in favour of Gondola Motor Credit Sdn. Bhd. on full payment of the purchase price and delivered the issue document of title to the purchaser which has since remained in its possession. The certificate of sale, however, could not be registered because of the private caveat entered into by Almurisi. The fact of this aforesaid caveat was stated in the proclamation of sale as follows:

> Caveat: **PTB 8647**
>
> Private caveat entered by Almurisi Holdings Sdn. Bhd. *vide* Caveat Serial No. 681/86 Jilid No. 228, Folio 26 dated 25 March 1986,

which also stated that the property was being sold subject to existing caveat.

On being unable to register the certificate of sale by the Court and thereby to be registered as the owner of the land, Gondola Motor Credit Sdn. Bhd. (the appellant) on 9 September 1989 applied to the Court in Originating Motion No. 25-35 of 1989 for the removal of the private caveat and registration of the certificate of sale citing Almurisi as the respondent. The learned Judge dismissed the application. Hence this appeal.

In the Court below it was argued that the option to purchase the subject land granted to Shaikh Mohamad was not *bona fide* as he was a director of Tg. Petri with knowledge that the land was subject to a charge. The learned Judge held he could not make a finding as to *bona fides* of the transaction on the affidavit evidence before him. It was further argued that Shaikh Mohamad should have objected to the charge in favour of Singapore Finance being created in 1981 after the option had been granted to him in 1980. As to this, the learned Judge held no adverse inference could be drawn and accepted Counsel's argument that in any event Shaikh Mohamad could not exercise the option until 1985. Finally, it was argued that the respondent should have intervened in these proceedings for the sale of the land under s. 256 of the National Land Code. On this point, the learned Judge held that it was not necessary as the respondent's interest in the land was already protected by the caveat.

On the evidence before him, the learned Judge held, on the authority of *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 52, that the respondent was entitled to enter the caveat. He further held that a certificate of sale under s. 259 of the National Land Code until registration does not *per se* enhance the appellant's equitable interest acquired subsequent to the respondent's caveat so as to equal, let alone override the respondent's priority of interest established by the caveat. Finally the learned Judge held:

> Although it is clear on the authorities (*Crosbie-Hill v. Sayer* [1908] 1 Ch. 866; *Abigail v. Lapin* [1934] AC 491 and *Zeno Ltd. v. Prefabricated Construction Co. (Malaya) Ltd. & Anor.* [1967] 2 MLJ 104, to name a few) that one's prior equity can be defeated or postponed by some act or omission on one's part, I fail to see how the facts in this case can be considered to have rendered it inequitable for the respondent to insist on its priority against the applicant especially when the applicant purchased the said property subject expressly to the caveat. This motion is accordingly dismissed with costs.

In view of the course which this matter has taken, it is necessary to return to first principles. All references to sections hereafter are to the National Land Code.

First, s. 340(1) confers an **indefeasible interest** in the land on the chargee upon registration of the charge unless it is made defensible by s. 340(2) in cases of fraud, forgery or illegality which do not arise in the instant case. Thus Singapore Finance, as chargee, held an indefeasible interest in Lot PTB 8647 (the subject land) when the charge in its favour was registered on 15 November 1981.

Second, under s. 256(3), on an application to Court for an order for sale by the chargee, it is **mandatory** on the Court to order the sale unless it is satisfied of the existence of cause to the contrary. No such cause to the contrary arose in this case when the order for sale was made.

Third, s. 259(3) provides that a successful purchaser at the public auction pursuant to an order for sale under s. 256(3) is entitled to a certificate of sale. Such a certificate was issued in the instant case.

Fourth, s. 267 (in so far as it is relevant) provides the effect of such a sale and reads:

> (1) Any certificate of sale given to a purchaser under subsection (3) of s. 259 or subsection (4) of s. 265 in respect of any charged land or lease shall be treated for all the purposes of this Act as an instrument of dealing, and shall be registrable accordingly under Part Eighteen; and, upon the registration thereof:
>
> (a) the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge in question and any charge subsequent thereto; and
>
> (b) subject to para. (a), and subsection (2), the relevant provisions of Part Fourteen shall apply as if the chargor had transferred the land or lease to the purchaser in accordance with the provisions of that Part.

Up to this stage, all the requirements of the law have been complied with for the appellant to be registered as the new owner of the subject land. The only impediment, it is contended, is the respondent's private caveat. The subject of private caveats has been exhaustively dealt with in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 and we do not find it necessary to discuss it at length here except to apply the law to the facts of this case. Section 327(1) provides:

> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

The appellants in this case are clearly the **aggrieved body** having paid the full purchase price for the land at a judicial sale and in possession of the certificate of sale and the issue document of title to the subject-land. They have satisfied the test in *Eng Mee Yong* (*supra*) where Lord Diplock said at p. 215:

> It is otherwise when the applicant under s. 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

The question is how effective is the respondent's caveat to prevent the registration of the certificate of sale acquired by the appellants. What then is a caveat?

> The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the Court of the caveator's claim to title to the land, in an ordinary action brought by the

> caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. Nevertheless their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued *ex parte* by the Registrar acting in an administrative capacity without the intervention of the Court and is wholly unsupported by any evidence at all. Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

Per Lord Diplock in *Eng Mee Yong* (*supra*) at p. 214.

It is clear from the authorities that a caveat cannot remain forever. Indeed under s. 328 it will lapse at the expiry of six years from the time it took effect. In *Macon Engineers* (*supra*) Gill CJ said at p. 54:

> It would seem abundantly clear from the authorities that, so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement.

Now, is there in this case a valid agreement for the sale of land in existence. The option of 10 April 1980 had clearly expired on 30 May 1985 when Shaikh Mohamad failed to exercise the option by then. The sale and purchase agreement between Tg. Petri and the respondent is an entirely new agreement and had nothing to do with the option. Both the option to purchase and the sale and purchase agreement are in writing. There is no reference whatsoever in the sale and purchase agreement to the earlier option to purchase although an attempt was made to relate the two transactions in the suit for specific performance by the respondent against Tg. Petri. The sale and purchase agreement itself had come to an end because of the failure to complete the purchase by 31 August 1985, although an attempt was made by the respondent to revive it in 1986. This attempt was the foundation to institute proceedings for specific performance against Tg. Petri. That suit too has come to a finality by the judgment in default of defence as no steps have been taken by Tg. Petri to set aside the default judgment. If there were serious issues to be tried, it had to be in that suit. It seems to us that the purported revival of the sale and purchase agreement in January 1986; the entry of the private caveat in March 1986; the filing of the suit in September 1986 and allowing judgment in default in February 1987, smacks of collusion between Tg. Petri and the respondents to protect the personal interests of the directors of Tg. Petri, past and present. The devices used here are simply to allow Shaikh Mohamad to remain in possession of the property in return for allowing the same property to be used by fellow director Raymond Yong as security for his personal loan from Singapore Finance. Be that as it may, assuming that the sale and purchase agreement is valid and subsisting, by Clause 1 of that agreement, Tg. Petri agreed:

> ... to sell the said property with vacant possession ... from all registered encumbrances ...

which means that Tg. Petri has to discharge the charge to complete the purchase. They have failed to do so and by Clause 7 the respondents have the right to enforce specific performance which they did in the 1986 suit and obtained default judgment. These matters, however, are not the concern of the appellants and do not affect their rights and interests in the land in any way. In the circumstances of this case, the only relief available to the

respondents is damages in lieu of specific performance which is what they prayed for and obtained in their suit against Tg. Petri. The purpose of the caveat is to protect the interests of the respondents in the land pending the trial of the 1986 suit.

With the default judgment obtained in that suit, there is in fact and law no longer any justification for the caveat to remain on the register.

At all material times, the option to purchase and the sale and purchase agreement were subject to the registered charge. Shaikh Mohamad was a director of Tg. Petri and in turn a director of the respondents and was well aware of the existence of the charge on the subject land. In any event, the fact of registration of the charge is notice to all the world of its existence. Any dealings subsequent to the charge and with notice of the charge as here cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale. The error in this case was to ignore the indefeasible title of the chargee and the continuous legal operation of the charge from the moment of registration up to the completion of the judicial sale and the issue of the certificate of sale.

For the reasons stated, we would allow the appeal with costs here and below. The order of the learned Judge is set aside. We order the removal of the caveat. Deposit to be refunded to the appellants.

Also found at [1992] 4 CLJ 2212